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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 448.

IN THE MATTER OF
VAN SWERINGEN CORPORATION,
Debtor,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Subsidiary Debtor.

THE CLEVELAND HOTEL PROTECTIVE COMMITTEE,
J. C. LINCOLN, GORDON MACKLIN, ROBERT H. JAMISON,
MELVIN B. HOTT AND ROY BRENHOLTS,
Individually and as Members of said Committee,
and
THE HENRY GEORGE SCHOOL OF SOCIAL SCIENCE,
Intervening Petitioners,
Petitioners,

vs.

THE NATIONAL CITY BANK OF CLEVELAND,
Successor Trustee,
and
THE CLEVELAND TERMINALS BUILDING COMPANY,
Respondents.

IN PROCEEDINGS FOR THE REORGANIZATION
OF A CORPORATION.

BRIEF OF THE CLEVELAND TERMINALS BUILDING COMPANY OPPOSING PETITION FOR WRIT OF CERTIORARI.

I. STATEMENT OF FACTS.

The statement of facts in the petition omits or glosses over facts which are of controlling importance. Of these, perhaps the most important are

(a) the fact that the Agreement and Declaration of Trust (R. 102, 639) by which the rights of the certificate holders are established vests the entire control and management of the trust property in the Trustee—one of the respondents in this case;

(b) the fact that the Subsidiary Debtor's interest in the hotel was, and is, a leasehold estate, and that the interests of the Subsidiary Debtor on the one hand and of the certificate holders on the other pertain to entirely different subject matters—the certificate holders' interests, to the reversionary estate, and the Subsidiary Debtor's interest to the leasehold estate.

The significance of these and other glossed over or omitted facts, will be developed in our brief at the points where they become material.

II. THE PARTIES.

The term "Subsidiary Debtor" no longer represents the interests of the original beneficial owners (the corporation was found to be insolvent); but it now represents the interests of the former unsecured creditors of that corporation, who have now become its stockholders and owners, seeking to recoup a fraction of their losses by rejuvenating the equities which may remain to them in the Company's building units. Hence the terms "Subsidiary Debtor," and "Building Company," as used throughout this brief, must be understood as being merely a convenient way of designating that great group who were originally the unsecured creditors.

The respondent Subsidiary Debtor is the lessee under the lease creating the leasehold estate which is the subject of this controversy.

The respondent Trustee (The National City Bank of Cleveland, Successor Trustee) is now the lessor under said

lease, and as such is the holder of the reversionary estate, for the benefit of the certificate holders.

The petitioners are certificate holders, most of whose certificates were purchased—"probably at distress prices," (R. 81)—during the reorganization and *after* the Hotel Plan was submitted to the certificate holders (R. 12, 13, 20, 68). Their beneficial interests are interests in the reversionary estate—not in the leasehold estate.

In the caption, the petitioners denominate themselves as "Intervening Petitioners." This is a misnomer; for the Committee has never been allowed to intervene on any question, and the limited intervention that was allowed to Mr. Hott and the School was restricted to a question of fact that is not now before this Court.

III. HOW THE CASE AROSE.

The Subsidiary Debtor was the owner of four large building units in the heart of the business section of Cleveland—the Terminal Tower, a department store building, a group of three large office buildings, and the Cleveland Hotel. The reorganization plan had separate sections for each of the four units, with a provision that they might be separately confirmed and separately consummated. This has been done as to all of the units except the Hotel. The present appeal relates only to the Hotel.

Three issues were presented to the Courts below:

(1) A question as to whether there was an abuse of discretion in refusing to permit a general intervention.

(2) A double question of fact relating to the Trustee's acceptance—was there a sufficient number of consents to the Plan, and were they obtained by fraud?

(3) A double question of law and fact relating to the Plan—do the principles of priority stated in *Case*

et al. vs. Los Angeles Lumber Products Co., Ltd., (1939) 308 U. S. 106 apply, and is the Plan fair and equitable?

On the question of intervention, the Special Master and the Trial Court had allowed petitioners to present all the evidence and make all the arguments they desired (R. 81, 830); but had refused general intervention to avoid potential claims of committees for allowance of compensation (R. 81). It is obvious that there was no prejudice to petitioners, and no abuse of discretion.

Likewise in the Court of Appeals, the petitioners were accorded a full and complete hearing, even though intervention had been denied.

On the questions of fact as to the number of consents to support the Trustee's acceptance, and the alleged fraud in obtaining them, the facts were found against Petitioners; and questions of fact are not reviewable here. This the Petitioners admit; and so they do not present in this Court any issues on the validity of the acceptance. (Petition, p. 7.)

On the question of law as to the applicability of the priority principles of the *Los Angeles* case, the Court of Appeals held them inapplicable where, as here, priority of claim or interest is not a factor; but the Court also found that for the proposed amendment of the lease, and the ancillary exchange of the back rent claim for stock and money, there is "a *fair and equitable* consideration" to the Trustee for the beneficiaries. That conclusion would have been the ultimate goal to reach even if the *Los Angeles* case had been applicable.

IV. SUMMARY OF ARGUMENT.

A. Petitioners Are Not Properly in Court on this Question.

Admittedly the petitioners are neither creditors nor stockholders (petition, p. 8) and have no right to be heard, or to appeal, as such. Sec. 206.* They may be heard on appeal only if they have been allowed to intervene.

However, the Committee was not allowed to intervene at all; and Mr. Hott and the School were allowed to intervene only on the questions of fact—the number of consents, and whether they were fraudulent. Those questions of fact are not before this Court, and on the questions which *are* before this Court, no intervention has been allowed to anyone. Hence, the petitioners are not properly in Court on this appeal.

B. Status of the Parties.

The petitioners are not in a creditor-position, and they have no interest in the leasehold estate which is the subject of this litigation. Their only interests are in the *reversionary* estate; and in acquiring those, they vested absolute control in the Trustee.

C. The Adjustment of the Leases in the Reorganization.

Priority of claims is not involved here—leases are. The proposed transaction is therefore governed by the lease readjustment principles of *Group of Institutional Investors, et al. vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (1943) 318 U. S. 523, and not by the absolute priority rule of *Case et al. vs. Los Angeles Lumber Products Co., Ltd.* (1939) 308 U. S. 106.

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* Sec. 206 provides in part:

"The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter."

D. Even Under the Rule of Absolute Priority the Plan is Fair and Equitable.

The advantages gained by the Lessor under the proposed lease are so great as amply to justify the sacrifices required by the Plan, including the removal of the back rent claim from the list of items entitled to the doubtful and partial security of the existing chattel mortgages, and the exchange of such back rent claim for the money and shares of the reorganized Subsidiary Debtor on the same basis as that allowed by the Plan to unsecured creditors. The Plan is therefore fair and equitable under either test—that of the *Los Angeles* case or that of the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case.

V. ARGUMENT.

A. Petitioners Are Not Properly in Court on This Question.

The Courts below permitted no intervention at all for the Committee. For Mr. Hott and the School, the Courts permitted intervention only on the question of acceptance (R. 86). Hence none of the petitioners are properly in court on this question of confirmation, and they have no right to be heard here on this subject. Such right could be acquired only by a ruling of this Court that Judge Jones had been guilty of an abuse of discretion in denying general intervention. Hence the petitioners' brief covering the subject of the fairness and equity of the Plan, should be considered only on the hypothetical basis of what the Court would do with that subject were the parties properly in Court thereon.

On this hypothetical basis both the Special Master and the Trial Judge permitted all the relevant evidence on the subject of confirmation that would have been permitted had the objectors actually been creditors, and they patiently heard all the arguments that were offered on that question. Petitioners have briefed the case here as though intervention had in fact been granted, instead of denied, to them.

Accordingly, we shall here present the arguments that would have been appropriate if intervention had been granted; but we shall do so only on the basis of that contrary-to-fact assumption.

B. Status of the Parties.

In the preceding paragraphs, we have referred to the petitioners' first false assumption, to wit:—that they are properly before the Court on the question of confirmation of the Plan.

Throughout the argument of petitioners runs a second false assumption—to wit, that the certificate holders are essentially creditors of Subsidiary Debtor, holding a senior lien upon its property. The fact is, of course, that they are merely beneficiaries of a trust where the Trustee is in a lessor-position—a lessor having a reversionary estate and a claim for delinquent rent.

Subsidiary Debtor's property right in the Hotel is a ninety-nine year leasehold, renewable forever. Subsidiary Debtor is the tenant, the Trustee is its landlord. What each certificate holder has is merely one or more of the 7000 equitable interests into which the *landlord's* equity has been divided. The *Subsidiary Debtor's* estate is merely a leasehold estate, and that has not been divided at all, and the certificate holder owns no part of that leasehold. What the certificate holder has is a right to his aliquot share of the income that remains to the landlord after the latter has paid the expenses.

This arrangement is a substitute for the business corporation method of group operation. How nearly parallel this trust runs to the corporation method may be noticed from the clauses in its Declaration of Trust (which corresponds to the Corporate Charter) in which absolute control and management is given to the Trustee (which corresponds to the Board of Directors) (R. 102, 639).

Article IX provides that:

"The Trustee may advise with legal counsel, and any action under this Trust Agreement taken or suffered in good faith by the Trustee in accordance with the opinion of such counsel shall be *conclusive on the Beneficiaries,* and the Trustee shall be fully protected in respect thereof. * * *

"The Trustee shall have the *exclusive right to control* the Trust Estate as it may deem for the best interests of the Beneficiaries, *free from all control by the Beneficiaries, as fully and to the same extent as though the Trustee were the sole legal and equitable owner thereof,* and shall not be subject to any obligations to the Beneficiaries other than such as are expressly assumed hereunder." (Emphasis ours.)

Article V provides that:

"* * * the Trustee shall have full authority * * * in such case (termination of lease) or in any other contingency to take such other action with respect to the Lease or Trust Estate as it shall deem advisable, without reference to the Beneficiaries and as if it were the sole legal and equitable owner thereof, and *no person dealing with the Trustee shall be bound to inquire concerning the authority of the Trustee so to act.*" (Emphasis ours.)

Finally, there is a provision which is no doubt expressive of the rule which would prevail anyhow, to-wit (Article XIII) that:

"By the acceptance of any Certificate issued hereunder, the original or any successive holder shall be deemed to assent to all of the provisions contained in this Trust Agreement."

Thus the certificate holders have committed the management of the enterprise (the reversionary estate) as completely to the Trustee as though they had been incorporated. Had they used the corporate form instead of the trust form, no one would ever have expected that any holder of an interest in such corporation (that is, any stockholder)

would have filed any objection or application to intervene or any other pleading in a bankruptcy proceeding where their corporation's tenant was the bankrupt or debtor, or would have claimed that he was the holder of any lien (senior or otherwise) upon the leasehold estate. Such a pleading would have been thrown out immediately upon the ground that the Landlord corporation was the proper party, and that no stockholder of such corporation had any separate or individual right.* This is precisely what happened in the case of *Commercial Cable Staffs' Association vs. Lehman, et al.* (1939, C. C. A., 2d) 107 F. 2d 917, where intervention was sought by an Association which was neither a creditor nor a stockholder of either debtor company but was only a creditor of a preferred shareholder. The Trial Court had permitted intervention; but the reviewing Court reversed this order and said:

> "Since the association is neither a creditor nor a shareholder of either of the 'debtors,' it had no standing to *object* to the plan, unless it may speak for the Commercial Cable Company, as preferred shareholder of the 'Associated Companies.' It is impossible to find any basis for allowing it so to speak." (p. 920, 2d column.)
>
> "The order of *intervention* was erroneous, and should not have been made; but it did not, and could not, create an interest in the reorganization which the Association did not have without it; it enabled the Association to appear, but it gave it no added standing to object to the plan." (p. 922.) (Emphasis ours.)

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* In such case had there been made a claim of fraud on the part of the corporation or its officers, intervention might have been allowed there, as here, to investigate such alleged fraud; but certainly it would go no further. If fraud were absent there as here, then the claim would be terminated there, as it should be here; and the claimant would certainly *not* be allowed to present himself as though he were a creditor or stockholder of the bankrupt tenant, nor to usurp the directors' function of speaking for the corporation on the question of the fairness and equity of its tenant's Plan of reorganization.

Similarly here petitioners are neither creditors nor shareholders of Subsidiary Debtor and they have no standing to object to the Plan, unless they may speak for The National City Bank of Cleveland, Trustee, and it is impossible to find any basis for allowing them so to speak. An order permitting them to intervene generally would have been erroneous. See also *In re South State Street Building Corporation* (C. C. A. Ill. 1943) 140 F. 2d 363, (certiorari denied, 322 U. S. 761).

The petitioners' argument might have been appropriate if the ownership in the Hotel property had been vested in a single corporation owning the fee simple title to the premises, with the petitioners as owners of a mortgage bond issue, and with Subsidiary Debtor (or its many former unsecured creditors, now its stockholders) as the stockholders in such corporation.

This is exactly what petitioners argued in the Trial Court—that the two situations just described were exactly equivalent; and the Court of Appeals, quoting the Trial Judge, rejected that argument succinctly when it stated in its opinion (R. 835):

> "As stated by the district judge, this 'is not a case of stockholder retention of interest to the detriment of bondholders and creditors'; but our concern is the problem of adjustment of the rights of lessor and lessee under a defaulted lease and the modification of a lease indenture."

C. The Adjustment of the Lease in the Reorganization.

The problem actually before the court, however, is that of a lease adjustment between the Subsidiary Debtor as tenant and the Trustee as its Landlord. As pointed out by the Special Master in his report recommending confirmation, this Landlord is a *single creditor*—the sole creditor in its class. There is no room or place for the usual process

and method of reorganization of creditors' rights by vote of ⅔rds of a *class* of creditors.*

Chapter X recognizes the lease problem [Sec. 106(7)]** and makes special provision (Sec. 202)† for dealing with rejected leases. Sometimes, as here, a lease is not rejected but is modified by agreement made with the landlord. The United States Supreme Court dealt with such a problem in the reorganization case known as *Group of Institutional Investors, et al. vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company* (1943) 318 U. S. 523. The debtor was the tenant under a lease to it of a part of the railroad system known as the Terre Haute Division. The lessor Corporation's mortgage bondholders were permitted by the Court to be heard on their objections to the proposed

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* It is true that the Landlord in this case desired to amend its Declaration of Trust, as well as to compromise its back rent, and therefore had first to get consent to the amendment by the holders of ¾ths of the outstanding interests; but that process was beyond and outside the Chapter X reorganization and the jurisdiction of the Bankruptcy Court. As indicated by the Special Master's report (R. 37), the Court there departed from its bankruptcy functions and sat as a Court of Equity to investigate the alleged misconduct of the Trustee.

** Sec. 106 contains definitions, and par. (7) states:

"'Executory contracts' shall include unexpired leases of real property."

† Sec. 202 provides, in part:

"The claim of the landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be provable, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by such lease for the three years next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid accrued rent, without acceleration, up to such date of surrender or reentry: *Provided*, That the court shall scrutinize the circumstances of an assignment of a future rent claim and the amount of the consideration paid for such assignment in determining the amount of damages allowed the assignee thereof."

adjustment of the lease; but in answer to those objections the Court said at page 546:

> "*Treatment of the Terre Haute Bonds.* The treatment accorded these bonds is attacked by the Terre Haute and representatives of its bondholders as well as by certain groups of Milwaukee bondholders. The Terre Haute interests contend, in the first place, that the plan contains no findings necessary for determining how the sacrifices required of these bondholders shall be distributed *inter se.* It is pointed out that the modifications proposed by the Commission for these four classes of bondholders are to be made regardless of the lien, security, interest or maturity of each and the earning power of the respective underlying properties. Hence it is argued that this phase of the plan is not fair and equitable, since it does not even attempt to preserve the respective priorities of these bond issues. The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. Nor has any question been raised or argued here as to the power of the Commission or the District Court so to treat them. The Commission and the District Court considered the problem solely as one of rejection or affirmance of a lease. The Terre Haute bondholders were in effect given the option to take the Terre Haute lines back or to agree to a reduced rental. If the Commission had authority to determine the question of rejection in the manner indicated and if it complied with the legal requirements for the exercise of that authority, the modifications which it proposed and which the District Court approved are valid. We think they are."

See also *In Re New York, New Haven & Hartford Railroad Co.* (C. C. A. Conn. 1945) 147 F. 2d 40, divisions 24, 25, 26 and 27 (certiorari denied in 325 U. S. 884), where the Court was dealing, not with a lease, but with a statutory corporate charter analogous to a lease. Parties interested in the charter attempted to object to the reorganization plan, but the Court said at p. 52:

"If the appellants are not to be regarded as creditors, as they contend, then they are merely offerees of a proposal for readjustment which they may accept or reject, and we cannot see that they were entitled to be heard."

Here, as there, the petitioners are not in any creditor-position, and have no standing to raise objections to the Plan; and here the Trustee for the certificate holders is in a position like that of the appellants in the cited case, of whom the Court said that they

"are merely offerees of a proposal which they may accept or reject."

The certificate holders have accepted the amendment to the Declaration of Trust by the requisite majority named in the amendment clause thereof, they have no right to invoke the absolute priority rule of *Case et al. vs. Los Angeles Lumber Products Co. Ltd.* (1939) 308 U. S. 106, they have no right to be heard here at all, and that should be the end of the matter.

As the Special Master said in his Report recommending confirmation (R. 46), which Report the Trial Judge accepted and approved (R. 83, 91):

"The acceptance of the Plan by the Bank does not involve the treatment of the debt only. Woven into the terms of the Plan, as they affect the debt, are the terms of adjustment and modification of the lease between the Bank and Subsidiary Debtor. The Bank evidently feels that the adjustments of the terms of the lease furnish a sufficient *quid pro quo*. That this feeling is not without justification is evidenced by the fact that from the evidence (Exhibits 'A' and 'D' attached to transcript of May 8, 1943), the Bank will receive, for the year beginning July 1, 1942, at least $150,000.00 more than the sum of $192,500.00 which it would receive under the terms of the 1927 lease." (R. 51.)

As it turned out, the Hotel income for the eighteen months period beginning July 1, 1942, was sufficient to have

paid the Trustee if the Plan had then been in effect,* the sum of $101,498.66 for the six months period beginning July 1, 1942, and the sum of $451,893.93 for the next twelve months, or a total of $553,392.59 for the eighteen months period, over and above the fixed minimum rental of $262,500.00 for the eighteen months period (R. 675, 681, 683)—a total of $815,892.59 as contrasted with the $288,750.00 to which the Trustee would have been entitled for the same period under the old lease. This is an actual money consideration, and not a mere "imponderable."

D. Even under the Rule of Absolute Priority the Plan is Fair and Equitable.

The testimony on the subject of fairness and feasibility is found in the transcript of testimony of November 19, 1940, at R. 732 to 737 inclusive, in the transcript of testimony of June 12, 1943, at R. 706 to 709 inclusive, and in a stipulation dated May 10, 1944. (R. 674.) Exhibits are listed in the footnote.**

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* In determining these amounts, income taxes were estimated, and reorganization expenses were disregarded.

** *Attached to the Plan—*

Exhibit A-4 (R. 707, 708, 715 to 717) gives the income account of the Cleveland Hotel for the years ended December 31, 1937, 1938 and 1939.

Exhibits of November 19, 1940—

Exhibit 2J shows how the Plan would have operated if in effect during the period from January 1, 1937, to December 31, 1940, when applied as stated in said exhibit (R. 732, 733, 739).

Exhibit 2-K is a projection for the years 1941 to 1960 inclusive, assuming for each year cash earnings equivalent to the average annual earnings on an accrual basis from January 1, 1937, to December 31, 1940, assuming the purchase of interests made at the full call price, and carrying qualifications as stated in said exhibit (R. 734, 735, 741).

Exhibit 2-L is a similar exhibit assuming purchase of interests at 65, with qualifications as expressed in said exhibit (R. 736, 737, 743).

(*Continued on following page*)

This section deals only with the fairness of the Plan. Petitioners do not question its feasibility.

As indicated in the foregoing sections, petitioners are essentially neither creditors nor lien holders, the Subsidiary

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(*Continued from preceding page*)

Each of the exhibits relating to the testimony of November 19, 1940, was fully explained and discussed by the witness in the transcript of testimony of that date.

Exhibits of June 12, 1943—

Exhibit A, pages 1 and 2 (R. 707, 711, 713), is the income account of the Cleveland Hotel for the period beginning January 1, 1940, and ending April 30, 1943, thus bringing down to the latter date the information shown in Exhibit A-4 (R. 707, 708, 715 to 717).

Exhibit B (R. 707, 708, 719) sets forth Article V of the Reorganization Plan in the bankruptcy proceedings.

Exhibit C is the Plan. (R. 128-151.)

Exhibit D (R. 707, 708, 721, 722 and 723) shows the income account of the Hotel for the first five months of the year 1943, and thus brings said information down to the end of the last calendar month preceding the date (June 12, 1943) of said testimony.

Exhibits Attached to the Stipulation—

The stipulation filed May 10, 1944 (R. 674), brings the income account of the Hotel down to December 31, 1943. It also shows how the actual earnings of the Hotel for the period from July 1, 1942 (the effective date of the Plan, if confirmed), to December 31, 1943, will operate in payment of additional rents and retirement of certificates, if the Plan is confirmed, provided, however, that the figures are subject to certain qualifications relating to unknown items, such as reorganization costs and expenses, and taxes.

The exhibits to the stipulation are as follows:—

Stipulation Exhibit A—Income Account of Hotel for years ended December 31, 1940, 1941, 1942, and 1943 respectively (R. 677, 679).

Stipulation Exhibit B—Additional Rentals Earned and Retirements made if Plan had been in effect from June 30, 1942, to December 31, 1943, with interests purchased at then prevailing current market prices (R. 681).

Stipulation Exhibit C—Additional Rentals Earned and Retirements made if Plan had been in effect from June 30, 1942, to December 31, 1943, with interests purchased at the maximum redemption prices (R. 683).

Stipulation Exhibit D—Table of prevailing current market prices of interests from October, 1933 to March, 1944 (R. 685).

Debtor's property is not the fee, but is merely the leasehold estate, the petitioners have no interest in the leasehold estate, the problem is not one of stockholder retention of interest to the detriment of bondholders, and the question is merely one of lease adjustment.

However, even if the facts were as petitioners assume them to be, and even if the absolute priority rule of *Case et al. vs. Los Angeles Lumber Products Co. Ltd.* (1939) 308 U. S. 106 were applicable, the Plan is still fair and equitable. In that decision it was held that if the bondholders surrendered any prior rights, there must be an adequate consideration given in exchange. We shall show that this condition is amply satisfied by the present Plan.

The Plan was devised in the months prior to October 15, 1940. It was filed in the Trial Court on that date. The Hotel business was then still in the doldrums that followed the great depression. The Subsidiary Debtor was hopelessly insolvent. The leasehold and the hotel as a whole were never appraised. The used furniture and fixtures which were the security for the back rent had value as part of the equipment of a going business—otherwise they were mere junk. The Trustee was perfectly right when it wrote a certificate holder that:

> "With respect to the large amount of accrued and unpaid rental, we believe that there is no possibility of substantial realization because aside from the security of the Hotel and its equipment (which will be retained as security under the Plan) there is an unsecured indebtedness of the Lessee Company of approximately $60,000,000.00 with which the certificate holders' debt must participate in the very minor assets which are not subject to other burdensome liens." (R. 245.)

Moreover, neither the Trustee nor the holders of a large majority of interests desired to go into the hotel business. They evidently preferred to remain in the position of landlord-owners of a hotel property which is leased to

someone else for operation as a hotel. No prospective management was in sight (R. 83) that could and would give as good promise of successful operation as that of Subsidiary Debtor under the proposed lease.

Under these circumstances, Subsidiary Debtor was seeking the benefits of a law for the relief of debtors—the Bankruptcy Law. Yet the only relief it was able to obtain in respect of the Cleveland Hotel was almost negligible—so much so as to raise doubts of the propriety of Subsidiary Debtor's going forward with the Plan. This relief was three fold:

1. Exchange of the back rent claim for stock of the reorganized Subsidiary Debtor and a small amount of cash, both at the same ratio as that awarded to unsecured creditors. (The security for the back rent claim was obviously inadequate, and there would clearly be a large deficiency claim as to the Hotel, entirely unsecured.)

2. A reduction of fixed rent from $192,500 per year to $175,000 per year, but only from July 1, 1942, to December 31, 1955. This reduction thus amounted to $17,500 per year for 13½ years only—a total reduction of $236,500.00.

3. A provision permitting the purchase of certificates on behalf of the new corporation which is to be formed and owned by the Subsidiary Debtor, so as to permit said new corporation an opportunity eventually to earn the right to own the property.*

In return for these slight concessions, the Subsidiary Debtor's said new corporation is required by the Plan:

1. To pay to the Trustee annually ½ of its net earnings (above fixed rent) to be divided into 7,000 equal shares (one for each of the 7,000 interests) to be disposed of as follows:

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* This last feature is a major benefit to the certificate holders also, providing an assured market for those who wish to sell, and an improved security for those who do not, as indicated later in this brief.

(a) In the case of each publicly held interest, its share shall be devoted to the payment of additional rent to the holder of such interest.

(b) The remaining shares shall be devoted to the purchase of interests.

2. To pay to the Trustee annually, until 3,500 of the 7,000 interests shall have been purchased, the other ½ of such net earnings, the same to be used in the purchase of interests.

3. To meet certain minimum requirements for the amount of additional rent to be paid, and certain other minimum requirements for the amount to be paid for the purchase of interests.

4. To agree to pay liquidated damages of $570,000.* in case of default under the modified lease. (The present lease has no provision whatever for liquidated damages.)

5. To surrender its privilege of perpetual renewal of the lease, and its option to purchase a portion of the premises (retaining, however, its option to purchase the entire premises).

6. To pledge to the Trustee approximately $139,000.00 (R. 50) of assets hitherto free from liens. All of these assets are pledged by the method of hypothecation of all the stock of the new Cleveland Hotel Corporation until ½ of the interests shall have been purchased; and in addition the tangible property is to be specifically pledged by a new or supplemental chattel mortgage.

7. To forego all dividends or profits until half of the interests shall have been purchased.

8. To issue to the Trustee about 1/65th of the stock of the reorganized The Cleveland Terminals Building Company plus a small amount of cash, in exchange for the back rent claim.

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* This amount is three times the sum ($190,000) of the initial fixed annual rent ($175,000) and an item of underlying ground rent ($15,000 per year), and is obviously based on the statutory maximum damages of three times the annual rent. Sec. 202. The Plan adopts this maximum and makes it "liquidated," i.e., contractual.

Every single one of these eight requirements is a substantial advantage to the Trustee (and through the Trustee, to the certificate holders) which it did not have under the old lease. These advantages more than compensate for the comparatively trifling concessions made by the Trustee. For example, the experience since July 1, 1942 (the effective date of the Plan, if the Order of Confirmation is affirmed) furnishes a complete answer to the objections concerning the back rent claim and the 13½ years ½% reduction of fixed rent. The record shows this experience down to December 31, 1943. In this 18 months' period, had the Plan actually been in effect, the additional rent would have amounted to $272,553.60 (R. 675, 681) at the least—a sum greater than the entire 13½ years' reduction of fixed rent, which amounts to $236,250.00, by $36,303.60.*

With the reduction of fixed rental thus amortized, the additional rental flowing from net earnings over the following years, when contrasted with the back rent claim, would soon surpass the latter, even taking into account the annual reduction in aggregate additional rent by reason of continuing annual purchases of interests.

This constitutes a real "money or money's worth" consideration, even under the rigid requirements of *Case vs. Los Angeles Lumber Products Co., Ltd., supra.* It cannot be shaken off as a mere imponderable.

Moreover the provision for retirement of interests was itself a great benefit to certificate holders. The great defect of the Land Trust Certificate as an investment has always been the lack of any provision for its eventual retirement. When the acceptance of this Plan was filed on June 29, 1942, and the fact became known that it contained a provision for purchase of interests, two things happened:

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* In determining these amounts, income taxes were estimated, and reorganization expenses were disregarded.

1. The market price of interests began a steady advance upward from 55 ($275.00 per $500 interest) on that date to 89½ ($447.50 per $500 interest) on the last date (March, 1944) shown in the table (R. 676, 687, 688).

2. The objectors, the first of whom in importance had quietly been buying up interests since the Plan was mailed out on August 9, 1941 (R. 123, 639), joined Mr. Hott who on a date ten days (R. 12) after the acceptance was filed, had been only a "one man committee," reorganized him within three weeks into a six man committee (R. 70, 74, 75) and became very active in court in this proceeding in opposition to the Plan.

Obviously the advancing price of the interests that followed upon acceptance and the improved prospects of the Plan both evidenced the public's favorable opinion of the benefits of the Plan for certificate holders, and also terminated the cheap market in which some of the chief objectors had been quietly buying.

Examination of the experience of a single interest will make clear the monetary advantage which the Plan brings to the certificate holder. Under the old lease $27.50 per interest per year was the fixed and invariable rent, and there was no "additional rent" whatever. Under the proposed lease* a certificate holder would have had for each interest he owned, for the half year ended December 31, 1942, $12.50 fixed rent plus $7.25 additional rent, or a total of $19.75 for the six months—a rate of $39.50 on an annual basis. For the year 1943 he would have had for each interest $25.00 fixed rent plus $32.38 additional rent, or a total of $57.88 on an annual basis—this as against $27.50 per year under the old lease (R. 675, 681).

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* In the following figures income taxes are estimated and reorganization expenses have been disregarded.

For subsequent years he would have had good prospects for further gratifying returns. On the other hand, he had a constantly improved market for the private sale of his certificate if he needed the principal for his personal wants—something the certificate holder had not theretofore had for about ten years. If his name were drawn by lot and his interest purchased by the Trustee contrary to his desire, it could only be by a return of his principal in full—another thing he could not have had at any time during the preceding ten years—plus a $5.00 premium.

Even if a liberal discount is allowed because these 18 months of experience came in war years (albeit early in the war) the results are still more than favorable to the certificate holder. Nevertheless Subsidiary Debtor made its bargain in good faith and would prefer to go through with it (in spite of its comparatively slight and actually temporary relief for possible difficult years until 1956, and with no relief at all for hard times if they come after December 31, 1955) and to complete its reorganization, than to reenter the field of negotiation and plan making once more.

From the certificate holder's point of view it should be noted that the effective date of the Plan, if the Order of Confirmation is affirmed, has already been fixed by its own terms (R. 130, 639) at July 1, 1942,* so that the figures quoted above will represent actual disbursements to certificate holders, subject to determination of income tax,

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* This provision for fixing the effective date of the Plan meets the test imposed by *Reconstruction Finance Corporation vs. Denver & Rio Grande Western Railroad Company* (June 10, 1946) .... U. S. ...., 66 S. C. 1282, as does the disposition of war time earnings through the provision for payment to the Trustee, for the benefit of certificate holders, of net earnings above fixed rental—all net earnings above fixed rental until one-half of the interests have been purchased, and thereafter one-half of such net earnings.

which has been estimated, and subject to reorganization expense, which has been disregarded.

No amount of theorizing can avoid the plain facts that have been revealed by this 18 months test. The Plan *does* carry substantial benefits for certificate holders, and those benefits *do* compensate for the acceptance of stock of the reorganized Subsidiary Debtor in exchange for back rent. The Special Master said in his Report on Confirmation:

> "The Bank evidently feels that the adjustments of the terms of the lease furnish a sufficient *quid pro quo*." (R. 51.)

It is now evident that the bank was right.

As the Court of Appeals said in its opinion,

> "* * * it appears that the trustee exercised good business judgment in advocating acceptance of the plan of reorganization of the lessee-debtor." (R. 836.)
>
> "As has been indicated, it is our judgment that, for the concession of its strict legal rights, the trustee under the plan of reorganization of the lessee-debtor receives a fair and equitable consideration for execution of the new lease for the benefit of the beneficiaries of the trust." (R. 839.)

The real grievance of petitioners seems to be that the Trustee did not insist upon a forfeiture of the leased premises and undertake to operate the Hotel itself, or turn it over to petitioners or their nominee, for operation. The Trustee, and a large majority of the certificate holders, did not think this course would be for the best interests of the certificate holders—even if such a forfeiture would have been permitted by the Bankruptcy Court, which, as a court of equity, abhors forfeitures. The Plan provided for a new lease which is demonstrably more favorable to the certificate holders than a continuance of the old lease, and at the same time gave the Lessee some inducement to continue the operation of the Hotel—first, for the benefit of the certificate holders and, second (and contingently)

for the benefit of the unsecured creditors of Subsidiary Debtor who have become the stockholders of the reorganized Subsidiary Debtor. In the judgment of the Special Master, the District Judge, and the Circuit Court of Appeals, as well as the Trustee and more than three-fourths of the certificate holders, the Plan was fair as well as feasible. Petitioners, as holders of a minority interest in the landlord's position, should not be allowed to upset the Plan, and so impose their will upon the overwhelming majority of the certificate holders, whose situation is similar to that of petitioners and who are not shown to have any ulterior interest or motive which would lead them to support a plan that did not serve the best interests of certificate holders as such.

E. Conclusion.

The petitioners are not properly before the Court on the question of Confirmation of the Plan. If, however, the contrary assumption is made as an hypothesis for the sake of argument, the problem is seen to be one of readjustment of the terms of a lease between Subsidiary Debtor and a single creditor, and not one of readjustment as between stockholders on the one hand, and bondholders with a prior lien, on the other hand. Even if it were the latter, a consideration which is more than adequate has been provided for what the Landlord surrenders, so that the Plan is fair and equitable within the test of all the authorities. Finally, the whole situation may be summed up thusly:

> There is no other lease with a new lessee now available to be considered as an alternative to the proposed amended lease to a subsidiary of the present lessee. The dissenting certificate holders may say they could find such a lessee. If so, they should have brought him forward before this with a showing of his responsibility, and of the terms on which he would be

willing to make a lease. It seems beyond the realm of possibility that any responsible new lessee would be willing to make a lease under which the lessee was precluded from taking any cash profit out of the property unless and until one-half (½) of the outstanding certificates had been paid off. We do not believe the Court will take seriously the assertion that such a lessee could be found, even if the Court were willing to go back of the discretion and authority which is granted by the Declaration of Trust to the Trustee to make decisions on such matters on behalf of the certificate holders. The choice is between

(1) A fair new lease to a lessee controlled and operated by personnel with a demonstrated capacity to operate a high-class hotel with a national reputation for high standards and good service, with a demonstrated capacity to operate at a large profit without departing from those standards, in a time when hotel business is good, and with a record of having failed to make profits, only when almost all other comparable hotel properties were also failing to make profits; and

(2) Demolishing the existing management structure and its appurtenant good will and "taking a chance" on the results of direct management by a bank trustee, or a possible new lease to a (yet undiscovered) new lessee, who would maintain the standards necessary to the long-term value of the property and its appurtenant business, for a reward as small, and as long postponed, as that provided for the proposed subsidiary lessee and its owners under the Hotel Plan now before the Court.

The Trustee wisely decided in favor of the first alternative, and holders of more than three-fourths (¾ths) of the outstanding interests have ratified that decision. The dissenting certificate holders should not be allowed to upset this decision and force the Trustee and the majority cer-

tificate holders into a speculation they do not want, and do not consider a sound business policy.

Respectfully submitted,

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